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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DONALD LAMAR WOODS, Appellant.	2 CA-CR 2007-0225 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062586

Honorable Richard Nichols, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 Appellant Donald Lamar Woods was tried in absentia, and a jury found him guilty of burglary in the second degree and criminal trespass in the first degree. The trial

court vacated the criminal trespass verdict as a lesser included offense of burglary. After finding Woods had two prior felony convictions, one of which qualified as an historical prior felony conviction, the court sentenced him to an enhanced, aggravated prison term of thirteen years. On appeal, Woods argues the court erred in trying him in absentia, vacating the jury's guilty verdict on the criminal trespass charge instead of the burglary charge, imposing an aggravated sentence in light of the mitigating evidence he presented, and in denying his constitutional right to a jury trial on the allegation of prior convictions. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On June 12, 2006, Dayle C. returned home from work to find her refrigerator door open and her hallway and bedroom lights on, although she had not left them on that morning. She also noticed that a rocking chair had been wedged underneath the doorknob of her front door to prevent entry through that door. She discovered some of her jewelry was missing and called the police. Dayle then found glass on the floor of her den and discovered her DVD player was missing. After police officers arrived, she found the window in the den had been completely broken, her patio door was open, and her backyard gate had been kicked in.

¶3 A crime scene technician lifted latent fingerprints from various locations inside and outside the house and took a sample of a substance that appeared to be blood. A fingerprint examiner later compared the latent fingerprints with Woods's known prints and

confirmed the prints at the crime scene belonged to him. DNA[1] analysis also confirmed the substance taken from the crime scene was Woods's blood.

¶4 A grand jury indicted Woods for second-degree burglary, and the state alleged that he had committed the offense while on release for a separate charge and he had multiple prior felony convictions. Trial was initially set for March 6, 2007, but the trial court granted Woods's motion to continue and reset the date to May 22, 2007. When Woods failed to appear for trial on May 22, the court found his absence voluntary and conducted the trial in absentia.

¶5 At the sentencing hearing, Woods claimed his absence from trial was due to a serious illness. The court confirmed its earlier finding that his absence had been voluntary and, after a bench trial on the allegation of prior convictions, sentenced Woods to thirteen years in prison.[2] This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

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[1]Deoxyribonucleic acid.

[2]The trial court made no explicit finding at the sentencing hearing that Woods's absence from trial was voluntary. However, based on the court's finding that Woods had failed to comply with his release conditions by failing to maintain contact with Pretrial Services or his attorney, we can infer the court found his absence voluntary. *See State v. Beasley*, 205 Ariz. 334, ¶ 25, 70 P.3d 463, 468 (App. 2003) ("Explicit findings are preferable but not necessary when basis for trial court's ruling appears in the record.").

Discussion

Trial in Absentia

¶6 Woods first argues the trial court violated his constitutional right to be present at trial by allowing it to proceed in his absence. He contends the court disregarded his uncontradicted testimony that he had been seriously ill and had maintained contact with Pretrial Services during his illness, and it therefore abused its discretion in finding he was voluntarily absent from trial. We review for an abuse of discretion a trial court's determination of whether a defendant's absence was voluntary or involuntary. *State v. Reed*, 196 Ariz. 37, ¶ 2, 992 P.2d 1132, 1133 (App. 1999).

¶7 "A defendant has a constitutional right to be present in the courtroom at every critical stage of the proceedings against him." *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983); *see also Illinois v. Allen*, 397 U.S. 337, 338 (1970). But this right is not absolute and "may be waived if the defendant voluntarily absents himself." *Hall*, 136 Ariz. at 222, 665 P.2d at 104; Ariz. R. Crim. P. 9.1. "The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his . . . absence should he . . . fail to appear." Ariz. R. Crim P. 9.1; *see also State v. Sainz*, 186 Ariz. 470, 472, 924 P.2d 474, 476 (App. 1996). The defendant bears the burden of establishing that his absence was not voluntary. *Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d at 1134.

¶8 On appeal, Woods does not dispute that, pursuant to Rule 9.1, he received notice of his trial dates, of his right to be present, and of the fact that the trial could go

forward in his absence. *See Hall*, 136 Ariz. at 222, 665 P.2d at 104 (requirements of Rule 9.1 satisfied when defendant receives personal notice of initial trial date but not subsequent continuances). And he acknowledged at the sentencing hearing that, between his release from custody in January 2007 and his trial in May, he had not maintained contact with his attorney.

¶9 Woods testified, however, that he had stayed in contact with Pretrial Services and that they had visited him at his home because he was so ill. But he did not provide any dates on which the visits had occurred nor did he testify that he had informed Pretrial Services he would be unable to attend his trial because of illness. Furthermore, before the sentencing hearing, Pretrial Services had filed a report with the court that stated Woods had "ceased contact with th[e] agency after February 23, 2007[,] . . . attempts to locate him were unsuccessful[, and] . . . another resident of his former address informed Pretrial Services [Woods] had moved and his whereabouts were unknown." And, although Woods testified he believed he was in the hospital on May 22, the first day of trial, he provided no documentation to support this claim.

¶10 Thus, the only evidence tending to show Woods's absence was not voluntary was his uncorroborated testimony that he had been in the hospital on the first day of trial. In light of this and the contradictory evidence as to whether Woods had maintained contact with Pretrial Services, we cannot say the trial court abused its discretion in finding Woods failed to meet his burden of demonstrating his absence was involuntary. *See Hall*, 136 Ariz. at 222, 665 P.2d at 104.

Jury verdict

¶11 Woods next argues the trial court erred in sentencing him for burglary and vacating, as surplusage, the jury's guilty verdict on the lesser included offense of first-degree criminal trespass. He contends the jury improperly found him guilty of both a greater and lesser offense and that, from these verdicts, "it is apparent that either the jury found the defendant *not guilty* of the greater offense . . . as a prerequisite to moving onto the lesser included offense, *or* after full and careful consideration of the evidence and reasonable efforts at deliberation, it *could not agree upon a unanimous verdict*." Thus, he concludes, the verdicts were ambiguous, and the court should have sentenced him only for criminal trespass.

¶12 At the conclusion of the evidence, the jury was given verdict forms for both second-degree burglary and first-degree criminal trespass. The court instructed the jury that, if it found Woods "not guilty of [burglary] or if after full and careful consideration of the evidence and reasonable efforts at deliberation [it could not] agree upon a unanimous verdict, [it could] consider . . . the lesser included offense" of criminal trespass. The verdict form contained this same instruction. The jury nonetheless found Woods guilty of both offenses, and, when polled, all jurors affirmed their verdicts. After releasing the jury, the court realized the error and tried unsuccessfully to reassemble the jury. It then found the verdicts were valid but stated Woods could argue the issue at sentencing.

¶13 At sentencing, Woods argued the verdicts were ambiguous and the court should therefore "give him the benefit of the doubt" by sentencing him only for the lesser

offense. Although the court acknowledged "the better practice would have been to require the jury to return to their deliberations and reinstruct them on the procedure concerning the lesser included offense," it nonetheless found "that it was obvious to the Court at the time that it accepted the verdicts from the jury that it was the jury's intention to convict the defendant of burglary in the second degree."

¶14 Whether the trial court properly vacated the verdict for a lesser included offense upon conviction of the greater offense is a question of law we review de novo. *See State v. Stuart*, 168 Ariz. 83, 87, 811 P.2d 335, 339 (App. 1990). Woods relies on *State v. Engram*, 171 Ariz. 363, 831 P.2d 362 (App. 1991), and *State v. Rich*, 184 Ariz. 179, 907 P.2d 1382 (1995), for the proposition that the trial court had the discretion to vacate the verdict on the greater offense and sentence him only for the lesser offense.[3] In *Engram*, the jury had rendered guilty verdicts for theft and both burglary and a lesser included charge of criminal trespass. 171 Ariz. at 365, 831 P.2d at 364. The court polled the jury on the burglary and theft verdicts and vacated the trespass charge sua sponte. *Id.* After excusing the jury, the court informed counsel of the verdicts, but defense counsel made no objection and did not ask the court to question the jury further. *Id.*

[3]Woods also relies on *State v. Restrepo*, 878 S.W.2d 327 (Tex. App. 1994), for the proposition that a finding of guilt on a lesser included offense constitutes an implied acquittal of the greater charge. However, as Woods notes, in *Restrepo* the jury made no express finding of guilt or innocence as to the greater offense; it only found the defendant guilty of the lesser offense. 878 S.W.2d at 328. Therefore, *Restrepo* is inapposite to the situation presented here, where the jury returned verdicts of guilt on both offenses.

¶15 On appeal, Division One of this court noted that, had the defendant objected, the jury could have been asked to clarify its intent on the record. *Id.* at 366, 831 P.2d at 365. The court further observed, "Every case that we can find that considers this precise problem concludes that the verdict of guilty on the lesser included offense should be vacated, and the verdict on the greater offense should be allowed to stand." *Id.* It concluded that, although "a better way to handle th[is] problem would be to explain the situation to the jury, reinstruct on the law, and allow the jury to deliberate further," a trial court's failure to do so did not constitute reversible error. *Id.* at 366, 831 P.2d at 365, *citing United States v. Howard*, 507 F.2d 559 (8th Cir. 1974).

¶16 In *Rich*, the jury convicted the defendant of both a greater and a lesser included offense, but the trial court did not mention the lesser offense when it read the verdicts and never informed counsel that the jury had rendered guilty verdicts on both the greater and lesser offenses. 184 Ariz. at 180, 907 P.2d at 1383. The defendant's appellate counsel discovered the additional verdict while preparing the appeal, and Rich argued the trial court's failure to disclose the verdict on the lesser included offense was reversible error. *Id.* This court affirmed, relying upon *Engram*, but our supreme court reversed, finding the failure to inform counsel of both verdicts constituted error that the court could not say was harmless. The court reasoned that, if asked, the jury might have changed its verdict on the greater offense. *Id.* at 181, 907 P.2d at 1384. However, the supreme court expressly limited its holding to cases in which the trial court failed to inform the parties of verdicts that conflicted with the trial court's instructions, "leav[ing] for another day the case in which a

verdict returned in apparent disregard of the court's instructions can be cured short of resubmission to the jury." *Id.* n.1.

¶17 We agree with Woods that "the rule stated in *Rich* and *Engram*[, that the jury should be reconvened and instructed further,] should have been followed" here and that these cases illustrate "the remedy for this type of error is not automatic, but remains an open question, driven by the facts and circumstances of a case." But they do not lead to the conclusion, as Woods suggests, that the court in this case should have sentenced Woods for criminal trespass and vacated the burglary conviction.

¶18 The trial court informed Woods's counsel of the jury's verdicts on both offenses. Therefore *Engram* rather than *Rich* applies. And, contrary to Woods's argument, the record in this case does not suggest any infirmities in the jury's verdict on the burglary charge. In addition to the verdict form, which clearly shows the jury found him guilty of burglary, the jurors were individually polled, and each verbally affirmed his or her belief that Woods was guilty of that offense.

¶19 There is nothing inherently inconsistent about guilty verdicts on both a greater and lesser included charge.[4] It is entirely consistent that, having found Woods guilty of the greater offense, the jury would also believe him guilty of the lesser. *See State v. Chabolla-*

[4]We note that, for double jeopardy purposes, a defendant may not be convicted of both a greater and lesser offense. *See State v. Mounce*, 150 Ariz. 3, 5, 721 P.2d 661, 663 (App. 1986). But here, the trial court vacated one of the multiplicitous convictions before entering judgment; therefore, double jeopardy was not implicated. *See State v. Powers*, 200 Ariz. 123, ¶ 16, 23 P.3d 668, 672 (App. 2001) (vacating second conviction proper remedy where defendant charged and convicted twice for same offense).

Hinojosa, 192 Ariz. 360, ¶ 11, 965 P.2d 94, 97 (App. 1998) (lesser included offense composed of some, but not all, elements of greater offense such that it is impossible to commit greater offense without committing lesser). Thus, we agree with the trial court that the jury intended to convict Woods of burglary and had clearly elucidated that intention. It was therefore appropriate for the court to dismiss the lesser conviction for trespass as surplusage. *See Howard*, 507 F.2d at 561-63 (individual polling of jurors cured ambiguity in guilty verdicts of both greater and lesser included offenses; lesser offense constituted surplusage); *State v. Brown*, 191 Ariz. 102, 103, 952 P.2d 746, 747 (App. 1997) (vacating verdict on lesser charge as surplusage not fundamental error where jury polled and defense counsel failed to request further jury deliberation); *Engram*, 171 Ariz. at 366, 831 P.2d at 365; *Stuart*, 168 Ariz. at 87, 811 P.2d at 336 (where jury returned guilty verdicts on both greater and lesser charges, lesser charge was surplusage and properly vacated by trial court).[5]

Excessive Sentence

¶20 Woods contends the trial court abused its discretion in sentencing him to the "fully aggravated [prison] term of 13 years." "We will not disturb a sentence that is within statutory limits . . . unless it clearly appears the court abused its discretion . . . [by] act[ing] arbitrarily or capriciously or fail[ing] to adequately investigate the facts relevant to sentencing." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

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[5]The state asserts the trial court's instruction on criminal trespass failed to include an element of the offense; thus, the charge was properly struck on that basis. However, because we conclude the trial court did not err in vacating the trespass conviction, we need not reach this argument.

¶21 The trial court found the state had proved Woods had two prior felony convictions—attempted burglary in CR-20033315 and possession of marijuana in CR-43327—which the court considered in sentencing him. Contrary to Woods's claim, it is not unclear which conviction the court used for aggravation. After finding the state had proved the two prior convictions, the court stated Woods "was previously convicted of a felony in CR-20033315, that is an historical conviction . . . [and] a prior felony conviction in CR-43327 [which] the Court . . . is entitled to use . . . for purposes of aggravation and mitigation, but . . . is outside the time limits for an historical prior conviction." The court then used the conviction in CR-20033315 to enhance the sentencing range under A.R.S. § 13-604, found Woods's "prior felony conviction outweighs any mitigation suggested by the defense," and imposed the enhanced, aggravated prison term of thirteen years. Thus, it is clear from the record that the court intended to use the conviction in CR-43327 only to aggravate Woods's sentence and not to enhance it.[6]

¶22 Woods does not dispute the propriety of using his prior conviction in CR-43327 as an aggravating factor but claims the statutory maximum sentence was excessive in

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[6]The sentencing minute entry states the court found that Woods's "prior felony convictions outweigh any mitigation." However, even assuming, arguendo, the court also considered the conviction it used to enhance Woods's sentence as an aggravating factor, it was not prohibited from doing so. *See State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983). Furthermore, because the trial court did not abuse its discretion in imposing the fully aggravated sentence based solely on its consideration of the prior conviction in CR-43327, any error in considering the conviction in CR-20033315 as an aggravator was harmless. *See State v. Anderson*, 211 Ariz. 59, ¶ 7, 116 P.3d 1219, 1221 (2005) (trial court's failure to submit aggravating factor to jury harmless under circumstances of case).

light of the age of that conviction and the "extensive mitigating factors . . . , which include his poor health, and a history of drug addiction, the nonviolent nature of the offense, and his remorse." The trial court was obligated to consider the evidence Woods offered in mitigation, and the record demonstrates it did. *See State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). But it did not find the evidence mitigating in light of his criminal history, as was its prerogative. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357 (presentation of mitigating evidence does not require finding mitigating circumstances exist). The court's finding of one prior conviction under § 13-702(C)(11) was all that was constitutionally required to subject Woods to the maximum available sentence under that section. *See State v. Molina*, 211 Ariz. 130, ¶ 16, 118 P.3d 1094, 1098-99 (App. 2005) (aggravated sentence may be imposed upon finding of only one aggravating factor); *see also* § 13-702(B) (maximum aggravated term may be imposed if only one aggravating circumstance proven beyond reasonable doubt). Therefore, we cannot say the trial court's imposition of the statutory maximum sentence was an abuse of discretion.

Right to Jury Trial for Prior Convictions

¶23 Finally, to preserve the claim for further review, Woods argues his rights to a jury trial and due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and article II, §§ 4, 23 of the Arizona Constitution were violated when his prior convictions were found by the trial court and not a jury.

¶24 Woods concedes the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), excepts prior convictions from the requirement that

aggravating factors be found by a jury, and he readily acknowledges that our courts have adopted this exception. *See State v. Keith*, 211 Ariz. 436, ¶ 3, 112 P.3d 229, 230 (App. 2005). Nevertheless, he argues the propriety of *Almendarez-Torres* should be reconsidered in light of a subsequent case, *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring), in which Justice Thomas "opined that a majority of the Supreme Court now recognizes *Almendarez-Torres* was wrongly decided." However, we are bound by the decisions of our supreme court. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). And we are not at liberty to anticipate how it or the United States Supreme Court may rule in the future. *Myers v. Reeb*, 190 Ariz. 341, 343, 947 P.2d 915, 917 (App. 1997) (whether prior decision of supreme court is to be overruled is matter for it to determine).

Disposition

¶25 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge